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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CARLOS T. COOPER, JR., D.P.M. and
E. JOSEPH DANIELS, D.P.M.,

Petitioners,

v.

FORSYTH COUNTY HOSPITAL AUTHORITY,
INC., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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INTRODUCTION

This Brief is filed jointly on behalf of all respondents. The briefs filed by various defendants or defendant groups in the Trial Court discussed a number of defenses which we feel the Trial Court could

have appropriately used as a basis for allowing respondents' motions for summary judgment. However, inasmuch as Judge Erwin used the most obvious flaw in petitioners' case--absolutely no evidence of an antitrust conspiracy--it was not necessary to reach those bases.[1/]

What the petitioners list as the questions involved will be discussed subsequently in this Brief. However, the respondents respectfully submit to the Court that the Petition is factually inaccurate in a number of respects, and misleading in several others. Consequently, the respondents desire to use the first few pages of their allocation to present what we submit is a more accurate statement of the facts and background.

[1/] The Court of Appeals for the Fourth Circuit reached the same conclusion, stating: "Not only have appellants failed to proffer evidence from which a conspiracy can reasonably be inferred, appellees have tendered affidavits denying any anti-competitive conspiracy." (Page 8a of Pet. App.).

STATEMENT OF FACTS

In order to carry out its duty of insuring "that all patients admitted to or treated in any of the facilities, departments, or services of the hospital [Forsyth Memorial Hospital (hereinafter "FMH")] shall receive the best possible care" (Bylaws of FMH, Art. II, Sec. 1], (JA at 196)[2/] the Bylaws adopted by the Hospital's Board of Trustees provide that only licensed physicians and dentists who can sufficiently document their background, experience, training, demonstrated competence, adherence to professional ethics, good reputation, and ability to work with others will qualify for staff membership (JA at 196). The staff and its committees evaulate applications for staff privileges and make recommendations to the Board, and

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[2/] JA refers to Joint Appendix filed with Fourth Circuit Court of Appeals.

the Board passes on all such applications by measuring them against the stated staff membership criteria.[3/] This accords with the Board's responsibility pursuant to State law.

The Bylaws in question, and their implementation resulting in the denial of staff privileges to anyone unable to satisfy the Board's qualifications and policies regarding education and training, comply with Joint Commission on the Accreditation of Hospitals (hereinafter "JCAH") standards. These restrict medical staff membership to those licensed

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[3/] On page 6 of the Petition, the petitioners state that the medical staff determines "who shall be granted clinical privileges subject only to limited appellate review by the Board." This is inaccurate. The Board of Trustees is the only body, pursuant to State law and the Bylaws, with authority to grant or deny clinical privileges. The Board receives the advice and recommendations from the Executive Committee, but the Board makes the decision. Consequently, it is the Board of Trustees (consisting of lay persons--housewives, bankers, school teachers, lawyers, plant employees, etc.) that "determines who shall be granted clinical privileges", and not the medical staff as represented in the Petition.

to practice medicine and licensed dentists unless otherwise provided by law, and give hospitals the option of granting or denying clinical privileges to individual podiatrists who are appropriately licensed. (JA at 207). Furthermore, FMH Bylaws allow podiatrists to have allied health privileges but petitioners in this case have never sought those. The Board of Trustees' determination of whether or not a podiatrist applicant for surgical privileges is to be approved simply cannot ignore the differences in education and training of physicians and surgeons versus podiatrists and other allied health professionals. At FMH, even a surgeon who does not have any more residency training than the petitioners have would not be permitted to do foot surgery. This has been the rule for more than 20 years, long before these podiatrists applied.

Petitioners applied for staff privileges

at FMH in April, 1980. Upon receipt of the applications, the determination was made that the appropriate way of dealing with the applications was to convene the Bylaws Committee and have the Bylaws Committee conduct an in-depth study into the education and training of podiatrists in general, and the applicants in particular. The idea was to have a thorough and objective study of the qualifications of podiatrists in order to determine whether or not the Bylaws should be amended to allow podiatrists admitting and surgical privileges, as well as allied health privileges already available to them. Thus, three physicians who do not engage in foot surgery, and thus do not compete with the applicants, were appointed to serve as the Bylaws Committee. The Bylaws Committee held many hours of hearings over a number of days regarding the education and training of podiatrists

in general and the applicants specifically. The President of the Medical Staff put a notice on the bulletin board inviting all persons who had knowledge concerning the education, training and work of competent podiatrists to attend and share that information with the Committee. The podiatrists were represented by counsel throughout the hearings, engaged a court reporter to record all of the evidence, and brought in witnesses from near and far to testify. There were a great number of witnesses, most of whom were persons familiar with the differences in the education and training of a podiatrist and orthopedic surgeon. Some of the orthopedic surgeons on the medical staff attended the meetings and in a few instances testified, but in most instances responded to questions by the attorneys for the podiatrists. As was pointed out at oral arguments by a Judge of the Fourth Circuit, there must be

something wrong when an attorney for a podiatrist asks an orthopedic surgeon a question, the orthopedic surgeon answers the question, and the orthopedic surgeon is then named by that attorney as a defendant in a lawsuit as his reward for having answered the question. That is the case with respect to several of the orthopedic surgeons named as defendants in this lawsuit. In any event, the overwhelming majority of the speakers at the hearings were persons who do not do foot surgery or compete with the applicants in any way, but were opposed to changing the Bylaws on quality of care grounds.

The Bylaws Committee recommended against changing the Bylaws. The Committee stated that the "primary basis" for its recommendation was that FMH has "several orthopedic surgeons on its staff, all of the functions performed by a podiatrist may be performed by an

orthopedic surgeon, and podiatrists do not receive a medical education or training equivalent to that received by orthopaedic surgeons." (JA at 103, et seq.) In short, orthopedic surgeons are trained to treat the whole person. The Executive Committee (only one of fourteen members was an orthopedic surgeon) unanimously adopted the Bylaws Committee's recommendation, as did the Board of Trustees (none of whom compete with podiatrists--in fact, only three of eighteen are physicians) at its October 14, 1980, meeting. The Board of Trustees reaffirmed its decision after further consideration by the Joint Conference Committee (no persons doing foot surgery were on this Committee).

Of the thirty-five persons who voted not to change the Hospital Bylaws on quality of care grounds, and voted to deny the surgical privileges requested, only one was a physician doing foot

surgery. The majority were lay persons.

Petitioners reapplied for staff privileges in September, 1981, after enactment of N.C.G.S. 131-126.11A. The evidence of petitioners' education and training was unchanged, and the qualifications for staff privileges had not been altered. The Credentials and Executive Committees again recommended denial of petitioners' applications for the reasons set out in the recommendation of the Bylaws Committee as follows: permitting podiatrists admitting and surgical privileges would be "inconsistent" with the Bylaws mandate that patients receive the "best possible care," and more specifically that "orthopedic surgeons as a group can better serve the needs of the whole patient by diagnosing and treating physical and emotional causes which manifest themselves in terms of foot disorders," as well as the fact that "podiatrists do not receive internship

and residency training equivalent to that of an orthopedic surgeon." (JA at 103, et seq.) Despite the Credentials and Executive Committees' recommendations of denial, additional hearings were held by an Ad Hoc Committee[4/] at which petitioners and others were again permitted to make presentations as to their education, training and qualifications. Once more the conclusion was reached that the Bylaws should remain unchanged and petitioners' applications should be denied in the interest of assuring the highest quality medical care possible. After more hearings at which the petitioners' attorneys appeared on their behalf, the Board of Trustees approved the recommendations of the Credentials and Executive Committees at its meeting on February 9, 1982, on quality of care grounds. (JA at 103, et seq.)

[4/] No member performs foot surgery.

ERRONEOUS AND MISLEADING STATEMENTS IN PETITION

Before addressing the questions presented by petitioners, a few general observations concerning erroneous or misleading statements made by the petitioners would seem appropriate:

1. District Court Found No Evidence Of A Conspiracy.

On page 11 of the Petition it is stated ". . . the district court assumed there was proof of conspiracy, but found that the respondents 'had a duty to insure that the hospital provide quality patient care and that the actions by the Board and the Bylaws Committee were in response to this duty'". It is clearly erroneous to state that the district court assumed there was proof of conspiracy. Rather, the court stated: "The Court find that plaintiffs have failed to establish any evidence of a conspiracy on the part of the association with other defendants . . ." (Page 16a of

Pet.'s App.); and, "the Court has found that no conspiracy existed against plaintiffs to deny them staff privileges at Forsyth Memorial." (Page 17a of Pet.'s App.).

2. Limited Education And Training Of Petitioners.

On page 8 of the Petition, it is stated that "No attempt was made to deal with petitioners' individual qualifications . . .". This is also wrong. The Bylaws Committee, Credentials Committee, and Board of Trustees considered the petitioners' individual qualifications in great depth, probably greater than any individual application ever received by the Hospital. In fact, one physician (who does not do foot surgery) accepted the invitation of the applicants to go to the school where they studied podiatry to review the curriculum, faculty, facilities, etc. The individual qualifications, after being considered in the greatest detail, disclosed that these

petitioners did not have the education and training that is required of a physician or anyone else that wishes to do foot surgery at FMH.

The petitioners would also have the Court believe that the education and training of a podiatrist is equal to that of an orthopedic surgeon. This is erroneous. The Bylaws Committee fully explored this contention during its many hours of hearings (with a detailed study of the curriculum of the Schools of Podiatry, and the post-graduate training of podiatrists, being made). The Committee properly determined that the podiatrist's training is woefully lacking with respect to physical and mental problems which manifest themselves in terms of foot disorders, and the proper means of treating the mental and physical problem as well as the foot problem.[5/]

5/One must ask why the Committee would go to such great lengths to get evidence as to the education and training of both groups if the Committee had already conspired, as the petitioners

The Bylaws Committee, Credentials Committee, Executive Committee, Joint Conference Committee, and the Board of Trustees shared this view.[6] So, too, do the Courts.[7]

Footnote continued

contend, to deny privileges.

[6] A transcript of the testimony before the Bylaws Committee was made avaliable to the Executive Committee and Board of Trustees so that they could review the testimony and exhibits comparing the education and training of podiatrists and orthopedic surgeons.

[7] The North Carolina Court, for example, put it this way:

> [T]he majority view is that a podiatrist must exercise that degree of ordinary skill and care which is commonly exercised by other podiatrists in the same locality under similar circumstances. He is not bound to possess and exercise the degree of care and skill required of an ordinary physician or surgeon. . . Our review of the appliable statutes and the record indicates that the practice of podiatry is a narrowly restricted one. This allied health profession is not at all comparable with the practice of medicine and surgery. The educational requirements for a podiatrist are less demanding than those for physicians and surgeons. See G.S. 90-202.5. . . . Podiatry is obviously an "allied occupation" (to medicine) in the contemplation of our state law . . . . (citations

The differences between podiatrists and "full practice" physicians was also central in a leading case concerning alleged substantive constitutional rights deprivations through denial of staff privileges, Shaw v. Hospital Authority of Cobb County, 507 F.2d 625 (5th Cir. 1976)("Shaw I") and 614 F.2d 946 (5th Cir. 1980)("Shaw II") cert. denied, 449 U.S. 955, 66 L.E.2d 220, 101 S.Ct. 362 (1980). In Shaw I the podiatrists argued that denial of privileges to them while granting them to medical doctors was a denial of equal protection. The Court concluded that it was

> . . . unable to equate the various branches of the healing arts which would necessarily be included . . . the facts simply do not make out a case of persons similarly situated within the equal protection clause treatment requirement that all persons similarly circumstanced shall

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Footnote continued

omitted).

Whitehurst v. Boehm, 41 N.C.App. 670, 676-677, 255 S.E.2d 761, 765, 767 (1969)(emphasis supplied).

> be treated alike. [Citation omitted].

Id. at 623. The Shaw II Court determined that the hospital authority's decision not to amend the bylaws, after the court-ordered hearings, was justified by the discretion allowed to Trustees in appointing staff. The JCAH guideline provision that a hospital governing body "may grant clinical privileges to qualified, licensed podiatrists. . ." supported that decision, and the bylaws were reasonably related to the operation of the hospital (citing Sosa v. Board of Managers of Val Verde Memorial Hospital, 437 F.2d 173 (5th Cir. 1971)). The Board of Trustees of FMH reached exactly the same conclusion as did the Judges of the Fifth Circuit which upheld the denial of admitting and surgical privileges to podiatrists:

> . . . orthopedic surgeons as a group can better serve the needs of the "whole patient" by diagnosing and treating physical and

emotional causes which manifest themselves in terms of foot and leg disorders.

3. Hospital Responsible For Quality Of Staff.

At the time the Board of Trustees of FMH was considering the petitioners' applications for surgical privileges, the Trustees were well aware of court cases finding hospitals to be liable for negligent selection of persons permitted to treat patients. There are numerous cases so holding, perhaps the most famous of which is Darling v. Charleston Memorial Community Hospital, 33 Ill.2d 326, 211 N.E.2d 253 (1965). Many have stated something along these lines: "The Governing Board remains ultimately responsible for the efficient operation of the hospital and maintenance of high standards of professional care. Final authority to appoint or reject a physician rests with the Governing Board." Yarnell v. Sisters of St. Francis, 446

N.E.2d 35 (Ind.App. 1983).

North Carolina courts have indicated that a hospital may be held negligent for improperly granting privileges. Cox v. Hayworth, 54 N.C.App. 328, 238, S.E.2d 392 (1981); Rabon v. Hospital, 269 N.C. 1, 152 S.E.2d 485 (1967).

The most recent statement by the North Carolina Courts re the authority of hospital trustees to grant and deny privileges on quality of care grounds is from a case in which the Court upheld the denial of surgical privileges to a podiatrist at New Hanover Memorial, Cameron v. New Hanover Memorial Hospital, 58 N.C.App. 414, dis. review by S.Ct. denied, 307 N.C. 127 (1982), and quoted from the Fifth Circuit case of Sosa v. Board of Managers of Val Verde Memorial Hospital, 437 F.2d 173 (5th Cir. 1981) as follows:

> No court should substitute its evaulation of such matters for that of the Hospital Board. It

is the Board, not the court, which is charged with the responsibility of providing a competent staff of doctors. The Board has chosen to rely on the advice of its Medical Staff, and the court cannot surrogate for the Staff in executing this responsibility. Human lives are at stake, and the governing board must be given discretion in its selection so that it can have confidence in the competence and moral commitment of its staff. The evaluation of professional proficiency of doctors is best left to the specialized expertise of their peers, subject only to limited judicial surveillance. The court is charged with the narrow responsibility of assuring that the qualifications imposed by the Board are reasonably related to the operation of the hospital and fairly administered. In short so long as staff selections are administered with fairness, geared by a rationale compatible with hospital responsibility, and unencumbered with irrelevant considerations, a court should not interfere.

Training is one of those relevant professional qualifications "which may be constitutionally applied in determining the class of people who are eligible to practice medicine in a public hospital."

Shaw v. The Hospital Authority of Cobb County, 614 F.2d 946, 952 (5th Cir. 1980), cert. denied, 449 U.S. 955 (1981), quoting Foster v. Mobil County Hospital Board, 398 F.2d 227, 230 (5th Cir. 1968). The Accreditation Manual for Hospitals (1979 ed.), p. 84, prepared by the Joint Commission on the Accreditation of Hospitals, specifically suggests that specialty board certification or eligibility "is an excellent benchmark to serve as a basis for, privilege delineation . . . ."

4. Persons Denied Privileges Includes All Inadequately Trained Persons.

Throughout, the petitioners use the phrase "denied privileges as a class". This is inaccurate. In the first place, the Record shows that the education and training of petitioners was given detailed consideration. In the second place, petitioners were not denied privileges "as a class", but were denied privileges because they do not have the education, training and experience that is required of an orthopedic surgeon or of a general surgeon. As noted previously, even an orthopedic

surgeon, with no more residency training that that possessed by the petitioners in this case, would not be granted privileges to do foot surgery at FMH.

The truth of the matter is that the petitioners were denied privileges because they do not have the training and experience of a surgeon who is a medical doctor. Thus, the class that is excluded from privileges at FMH is not podiatrists but is everyone in the entire world who does not have the training and experience of a surgeon who is a medical doctor.

With respect to education, training and experience, the Record shows that the post-graduate training (internship and residency) of petitioners is virtually nill whereas all orthopedic surgeons are required to have a minimum of five years of such training before becoming Board Eligible as orthopedic surgeons.

Our research, and apparently that of

the petitioners, fails to disclose any case in which a Court has determined that the difference in the education and training of medical doctor surgeons and podiatrists does not justify denying surgical privileges to podiatrists (except where state law mandates such privileges, which is not the case in North Carolina)(See cases cited on pages 32-33).

5. North Carolina Law Does Not Mandate Hospital Privileges For Podiatrists.

On page 7 of the Petition, there is a reference to the 1981 legislation which is referred to as ". . . a new statute that required hospitals to base the grant or denial of privileges on the individual applicant's education, training, competence and experience." What the petitioners fail to point out is that the statute also provided that the hospital base its grant or denial of privileges on ". . . the reasonable objectives and

regulations of the hospital in which such privileges are sought." The statute also provides: "Nothing in this article shall be deemed to mandate hospitals to grant or deny to any parties privileges to practice in said hospitals."

6. Licensing And Accrediting Agencies Do Not Mandate Hospital Privileges For Podiatrists.

The petitioners would have the Court believe that FMH is "out-of-step" with the various licensing and accrediting agencies in its view that podiatrists do not have the qualifications necessary to provide quality care "to the whole patient". References are made to the JCAH, the AMA, and the North Carolina Hospital Association. It is true that the publications of these organizations provide that the Board of Trustees of a local hospital is permitted to approve or disapprove admitting and surgical privileges to podiatrists. (JA at 207) There are undoubtedly

small hospitals in rural areas where there are no qualified orthopedic surgeons or general surgeons to provide foot surgery, and the addition of a podiatrist to the staff of such hospitals would not constitute a substantial reduction in quality of care. But, where there is an adequate number of qualified surgeons, trained to treat the whole body and not just the foot without reference to the condition of the whole body, such privileges should not be allowed. This was the conclusion reached after considering many hours of testimony with respect to the qualifications of petitioners.

The fact that the accrediting and licensing agencies feel that the local boards of trustees should make the decision as to surgical privileges for podiatrists, and the effect of same on the quality of care, is appropriate.

The petitioners assert that the Credentials Committee found that the competence

of the plaintiffs was unquestioned. Actually, this is not true. What the Credentials Committee determined, as did the Bylaws Committee, the Executive Committee and the Board of Trustees, was that petitioners did not have the education, training and qualifications of an orthopedic surgeon, and thus should not be permitted to do foot surgery at FMH. (See full Report of Bylaws Committee, JA at 103-107).

7. NCOA Played No Role In The Decision Of The Board Of Trustees Of FMH To Deny Petitioners Staff Privileges.

Petitioners continue to argue a "role" of the North Carolina Orthopaedic Association ("NCOA") when there was none. Contrary to petitioners' assertions and speculation, which was rightfully rejected by the two lower federal courts, the NCOA played absolutely no "role" in the consideration or denial of petitioners' requests for surgical staff privileges at

FMH.

The NCOA is a small (approximately 200 members), voluntary, non-profit, educational association. The discipline of orthopedic surgery in North Carolina has a history of patient concern and continuing scientific achievement, and the NCOA's membership includes members of the faculties of Duke University School of Medicine. Bowman Gray School of Medicine (Wake Forest University), East Carolina Medical School, and the University of North Carolina School of Medicine, as well as leading practitioners from across the State. The Association is primarily an educational one which meets twice each year, once in the fall and once in the spring. Each meeting of the NCOA is devoted almost entirely to matters of continuing education through the delivery of educational papers and programs on medical topics of current interest to orthopedic surgeons. There

are also social functions in connection with each meeting and short (usually less than one hour) business sessions at each general meeting. The business meetings are conducted for necessary and routine business matters such as the election of officers, committee reports, planning for subsequent meetings and consideration of legislative matters of interest to the group. (JA at 305, et seq.)

In the context of considering legislation which had been introduced in the 1975 General Assembly of the State of North Carolina, the NCOA went on record as being against the practice of podiatry in a hospital setting. The purpose of the resolution was to pass on to the North Carolina General Assembly the NCOA's concern for patient welfare. Between 1975 and early 1984, the NCOA did not have any stated position on the issue of the hospital practice of podiatry.

However, in 1984 the NCOA passed the following resolution, which constitutes the only position taken on podiatry by the NCOA since 1975:

> The North Carolina Orthopaedic Association, Inc., in the continued interest of providing the patient with the best possible care, recommends that the hospital practice of podiatry be determined at a local hospital level, based upon appropriately reviewed and credentialed individual qualifications and in accordance with all applicable laws and regulations.

At the behest of petitioners, the staff of the Federal Trade Commission began an investigation into the activities of the NCOA, particularly with regard to its position on podiatry and their exclusion from the surgical staff at FMH. After three years of investigation and negotiations with the NCOA, on September 19, 1986, the FTC filed a Complaint and Consent Decree, pursuant to which the NCOA made no non-jurisdictional

admissions and denied any liability whatsoever. Pursuant to that Consent Decree, the NCOA has retained its right to publish any representation regarding the training, education, practice or other qualifications of podiatrists for which it has a reasonable basis. It is important to note that there is no allegation in the FTC's Complaint nor is there any admission in the Consent Decree that the NCOA had anything whatsoever to do with the denial of staff privileges to the petitioners by the Board of Trustees of FMH. In fact, nowhere in the Complaint or the Consent Decree is there any mention of FMH or any of the individual respondents in this case.

ARGUMENT

I. ACCESS BY THE PETITIONERS HEREIN TO FMH IS A LOCAL ISSUE WHICH HAS NO NATIONAL SIGNIFICANCE

Petitioners' argument that this case involves issues of national significance

should have no bearing on this Court's decision as to whether the writ should be issued, since such argument does not fall within the scope of Rule 17 of the Supreme Court Rules. Furthermore, the fact that the two petitioners in this case were denied staff privileges at FMH is a wholly local concern. A number of courts have recognized that the granting or denying of staff privileges on quality of care grounds is a decision for the board of trustees of the hospital in question and not one where courts should substitute their evaluation of such matters for that of the hospital board. Sosa v. Board of Managers of Val Verde Memorial Hospital, supra.

The Cameron court reemphasized the position that staff privilege decisions are local matters for which the board of trustees of the hospital are ultimately responsible and that as long as the qualifications

imposed by the board are reasonably related to the operation of the hospital and fairly administered, those decisions should be left alone by the courts.

The claims made by the petitioners in the incident case are not novel. There have been several other cases brought around the country on antitrust grounds by podiatrists seeking to overturn the denial of staff privileges to them at particular hospitals. In every one of those cases, the courts have resoundingly upheld the decision of the board of trustees denying privileges. Feldman v. Jackson Memorial Hospital, 571 F.Supp. 1000 (S.D.Fla. 1983), aff'd. (mem) 752 F.2d 647 (11th Cir. 1985), cert. denied, 105 S.Ct. 3504 (1985); Cameron v. New Hanover Memorial Hospital, 58 N.C.App. 414, dis. review denied, 307 N.C. 127 (1982); Shaw v. Hospital Authority of Cobb County, 614 F.2d 946 (5th Cir. 1980), cert. denied, 449 U.S. 955 (1981);

Davidson v. Youngstown Hospital Association, 10 Ohio App.2d 246 (1969); Kaczanowski v. Medical Center Hospital of Vermont, 1985-2 Trade Cases, ¶66,752 (D.Vt. 1985). There are other cases in which the podiatrists have prevailed, but all of those cases involve state statutes which mandate that podiatrists be given staff privileges, which is not the case under the North Carolina statute.

The non-significance of the instant case and of podiatrists' access to staff privileges at hospitals is highlighted by the fact that this Court has on two previous occasions refused to review Circuit Court of Appeals decisions affirming the denial of staff privileges to podiatrists. Shaw v. The Hospital Authority of Cobb County, 614 F.2d 946 (5th Cir. 1980), cert. denied 449 U.S. 955 (1981); Feldman v. Jackson Memorial Hospital, 571 F.Supp.

1000 (S.D.Fla. 1983), aff'd. (mem) 752 F.2d 647 (11th Cir. 1985), cert. denied, 105 S.Ct. 3504 (1985). Thus, only a year ago this court refused to issue a writ of certiorari in Feldman which involved claims similar to the ones made herein involving alleged violations of Section 1 and Section 2 of the Sherman Act.

In short, there is no compelling reason why this Court should now take a podiatry case involving issues of purely local concern.

II. FTC ENFORCEMENT POLICY HAS NO BEARING ON THIS PETITION

Petitioners next contend that this Court should exercise its discretion in granting the Petition for Certiorari because the Fourth Circuit Court of Appeals' decision allegedly conflicts with the enforcement policy of the FTC in hospital access cases (Petition at 21).

Assuming arguendo that petitioners'

assertion is correct, which respondents deny, there are at least three reasons why it is insufficient for the Court's positive exercise of its discretion in this case.

First of all, FTC enforcement policy has nothing whatsoever to do with any issue in this case. Supreme Court Rule 17 alone would appear on its face to preclude the Court's consideration of FTC enforcement policy. There is nothing in Rule 17 which even remotely indicates this Court might give consideration to an alleged conflict between the Fourth Circuit opinion and FTC enforcement policy.

Secondly, the FTC is obviously not a party to this action. As petitioners are quick to observe, the FTC has investigated the North Carolina Orthopaedic Association regarding its overall attitude toward podiatrists and podiatry. Furthermore, the FTC was obviously satisfied with the

resulting Consent Decree, only a portion of which is reproduced in the Appendix to the Petition at 134a. What petitioners conspicuously omit from their reference to the Consent Decree are the facts that the Consent Decree is for settlement purposes only and does not constitute any admission by NCOA that it has violated the FTC Act; the fact that NCOA is a nonprofit corporation; and, the remainder of paragraph II of the Order which states

> PROVIDED that nothing in subpart II(B) shall prohibit respondent from making or publishing a representation for which respondent possesses a reasonable basis regarding the training, education, practice, or other qualifications of podiatrists or any individual podiatrists.
>
> PROVIDED FURTHER that nothing in this order shall prohibit respondent from exercising rights guaranteed by the First Amendment to the United States Constitution to petition any federal, state, or local government, executive agency, or legislative body concerning legislation, rules or procedures, or to participate in any federal, state, or local administrative or judicial proceeding.

Moreover, it is important to note in this context that the FTC obtained and thoroughly reviewed all of the records of FMH regarding its policies and procedures relating to podiatry and podiatrists, following which the FTC made no claim or allegation whatsoever regarding either FMH or its medical staff with regard to not granting surgical staff privileges to petitioners or otherwise. Consequently, it is patently ridiculous for petitioners to contend, as they do here, that the Fourth Circuit opinion conflicts with FTC enforcement policy when the FTC has investigated the very transaction of which petitioners complain without instituting any enforcement action whatsoever against FMH, its trustees or its medical staff.

Finally, it is important to note that the opinion and decision below were rendered in the context of this private treble damage action, which was brought under

sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, and State law. There is nothing in the petitioners' amended complaint, nor in either decision by the lower federal courts, which relates to FTC enforcement or enforcement policy. Indeed, the FTC Act does not provide for private claims for relief, and the courts which have considered the question have uniformly held that private rights of action may not be implied under the FTC Act. See, e.g., Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973); Alfred Dunhill, Ltd. v. Interstate Cigar Corp., 499 F.2d 232 (2d Cir. 1974); Carolon v. Coca-Cola Co., 483 F.2d 279 (9th Cir. 1973).

III. THE FOURTH CIRCUIT'S DECISION IN THIS CASE DOES NOT CONFLICT WITH OTHER CIRCUIT DECISIONS REGARDING HOSPITAL ACCESS

The decision below of the Fourth Circuit Court of Appeals represents a sound and consistent application of well-established

rules of federal antitrust law to the particular facts of this case. The Fourth Circuit affirmed the federal district court's holding that the petitioners had presented insufficient evidence to support an antitrust claim against any of the defendants. This result is identical to the numerous federal district and circuit court opinions which have considered the responsibility of hospitals and its appointed committees to provide quality patient care through the credentialing process. Robinson v. Magovern, 521 F. Supp. 842 (W.D.Pa. 1981), aff'd, 688 F.2d 824 (3rd Cir. 1982); Smith v. Northern Michigan Hospital, 703 F.2d 942 (6th Cir. 1983); Pontius v. Children's Hospital, 552 F.Supp. 1352 (W.D.Pa. 1982); Feldman v. Jackson Memorial Hospital, supra; Vuciecebic v. MacNeal Memorial Hospital, 1983-2 Trade Cases (CCH) ¶65,711 (N.D. Ill. 1983); McElhinney v. Medical Protective

Co., 549 F.Supp. 121 (E.D.Ky. 1982); Kaczanowski v. Medical Center of Vermont, supra; cf., Cameron v. New Hanover Memorial Hospital, supra.

The decision of the district and circuit courts in this case are neither controlled by nor conflict with the Third Circuit Court of Appeals' decision in Weiss v. York Hospital, 745 F.2d 786 (3rd Cir. 1984), cert. denied, 53 U.S. L.W. 3669, 84 L.Ed.2d 836, 105 S.Ct. 1777 (1985), for the following reasons. First, unlike Weiss, the medical staff of FMH is not a defendant in this litigation. The petitioners did not allege that a "conspiracy" existed between and among the members of the medical staff to engage in any unlawful conduct.[8/]

[8/] The allegations in the complaint, paragraphs 37-42 (pages 30a and 31a of Pet. App.) are that the ". . . the defendants combined and conspired . . .", not that the medical staff combined and conspired.

With respect to the individual physicians named as defendants in the present case, the district and circuit courts, after thoroughly analyzing the participation of each physician, concluded that the plaintiffs proffered no evidence of conspiracy, and thus there was no illegal group boycott in violation of the Sherman Act.[9/]

[9/] The overwhelming majority of courts have held that medical professionals, like the orthopedic surgeon defendants in the present case, who serve on committees and who provide recommendations and advice, are not liable for such participation in corporate and agency decisions. These decisions have fallen into three general categories. First, most courts have reached this conclusion upon reasoning that to do otherwise would "chill" the expression of professional and expert opinion which is necessary for the proper care of patients. E.g., Smith v. Northern Michigan Hospital, supra; Stone v. William Beaumont Hospital, 1983-2 Trade Cases (CCH) ¶65,681 (E.D.Mich. 1983); Pontius v. Children's Hospital, supra; Robinson v. Magovern, supra. Second, courts have reached the same conclusion applying the doctrine that employees and agents of the same corporation cannot be held liable for conspiring with each other to produce corporate action. Copperweld Corp. v. Independent Tube Corp., 476 U.S. 752, 81 L.Ed.2d 628, 104 S.Ct. 2731 (1984); Robinson v. Magovern, supra;

Second, in Weiss, the court found that York Hospital was both controlled and dominated by M.D.s. In this case, however, petitioners alleged in their amended complaint (¶5) that the governing body of the hospital was the Board of Trustees, some 16 in number, 12 of whom were lay members. The Record shows that the final authority and control of staff privileges at FMH

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Pontius v. Children's Hospital, supra; Stone v. William Beaumont Hospital, supra; Sokol v. University Hospital, 402 F.Supp. 1029 (D.Mass. 1975). See generally, Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d 451 (9th Cir. 1979). Third, the United States Supreme Court reached a similar conclusion in holding that members of committees which considered and made recommendations to a state bar examining committee were not subject to liability for their participation under the state action exemption to the Sherman Act, in Hoover v. Ronwin, 466 U.S. 558, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984), applying Parker v. Brown, 317 U.S. 341 (1943). In Hoover, the Court noted that allowing a Sherman Act plaintiff to look behind the actions of a body advising a bar committee would "emasculate" the doctrine that such an agency or committee must determine the fitness of applicants for a law license. E.g., Sausalito Pharmacy, Inc. v. Blue Shield of Cal., 677 F.2d 47 (9th Cir. 1982).

was vested in the Board of Trustees by statute, charter and bylaws.

Third, in Weiss, it was admitted that the osteopaths were as qualified as M.D.s. The findings here were to the contrary.

IV. THE LOWER COURTS CORRECTLY APPLIED PRIOR DECISIONS OF THIS COURT IN GRANTING AND AFFIRMING SUMMARY JUDGMENT

Petitioners contend that the Court of Appeals applied an incorrect standard for summary judgment because it relied on this Court's standard set forth in Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 768 (1984). Petitioners contend that because Monsanto was a "dealer termination" case that the test it sets forth is somehow inapplicable in any other antitrust context.[10/]

[10/] The test, when set forth in its entirety requires that:

> The correct standard is that there must be evidence that tends to exclude the possibility of independent action by manufacturer and distributor. That is,

However, petitioners overlook the fact that Monsanto is not just a "dealer termination" case, but is also a "group boycott" case alleged under Section 1 of the Sherman Act, which is precisely the claim made by petitioners in this case.

Moreover, in this Court's recent decision in Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation, 475 U.S. _____, 106 S.Ct. _____, 89 L.Ed.2d 538 (1986), this Court made it clear that its standard for antitrust conspiracy set forth in Monsanto applies in non-dealer termination cases brought under Section 1 of the Sherman Act. In reversing the Third Circuit Court of Appeals, which earlier had reversed the district court's summary

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Footnote continued

> there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

judgment based upon an absence of significant probative evidence of antitrust conspiracy, this Court stated as follows:

> Thus, in Monsanto Co. v. Spray-Rite Service Corp. (citation omitted), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. (Citations omitted). To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of §1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. (Citation omitted). 89 L.Ed.2d at 553. (Emphasis added)

V. THE DISTRICT COURT AND THE COURT OF APPEALS PROPERLY APPLIED THE MONSANTO STANDARD

Both the district court and the Court of Appeals had ample evidence before them in the form of depositions, minutes of various meetings, attended by the podiatrists and their attorneys, and affidavits tendered by various defendants to discern whether a conspiracy violating Section 1 of the Sherman Act could be

inferred from the evidence presented. The Court of Appeals correctly points out that petitioners have offered no direct evidence of a conspiracy, but fully recognizes that under the Monsanto test, they may rely on inferences of a conspiracy which can be drawn from circumstantial evidence.

Neither court below has departed in any way from "accepted standards for summary judgment". Rule 56 of the Federal Rules of Civil Procedure most certainly applies in antitrust cases, and whether the Court of Appeals had applied the standard as set forth in Monsanto or had merely applied the language of the Rule, there simply was no evidence presented by petitioners at any stage of this proceeding to raise any issues of material fact regarding their conspiracy claim. The Monsanto test actually gives petitioners the benefit of the doubt by allowing them to survive a

motion for summary judgment if they can present sufficient circumstantial evidence from which to draw an inference of a conspiracy. This is a lenient test, which petitioners have obviously failed.

SUMMARY

In summary, respondents respectfully submit that the considerations specified in Rule 17 of the Supreme Court Rules do not exist in this case, and thus the Petition should be denied.

Respectfully submitted this 22nd day of October, 1986.

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CERTIFICATE OF SERVICE

This is to certify that on the 22nd day of October, 1986, copies of the BRIEF FOR THE RESPONDENTS IN OPPOSITION were mailed to the persons at the addresses stated below:

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